Supreme Court, U.S.
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No.

In The Supreme Court of the United States

THREE O REALTY, LLC,

Petitioner,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION D/B/A EMPIRE STATE DEVELOPMENT CORPORATION, and 42nd STREET DEVELOPMENT PROJECT, INC.,

Respondents.

On Petition For Writ Of Certiorari To The New York Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
Telephone: (215) 493-1973
Facsimile: (215) 493-1094
hamilton02@aol.com
Counsel of Record

MARK I. SILBERBLATT, ESQ.
NOVACK BURNBAUM CRYSTAL, LLP
300 East 42nd Street
New York, NY 10017
Telephone: (212) 682-4002
Facsimile: (212) 986-2007
msilberblatt@nbclaw.com

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether pretextual findings of blight by a state or local government satisfy the Fifth Amendment's requirement, which is incorporated by the Fourteenth Amendment, that all takings of private property be for "public use."

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OPINIONS BELOW

The opinion of the New York Court of Appeals, which dismissed Petitioner's appeal on the Court's own motion, is reported at 2002 N.Y. LEXIS 2384 (N.Y. Sept. 12, 2002). The opinion of the Supreme Court of New York, Appellate Division, First Department is reported at 744 N.Y.S.2d 121, 2002 N.Y. App. Div. LEXIS 6603 (N.Y. App. Div. 1st Dep't 2002). The determinations and findings of Respondent New York State Urban Development Corporation, issued on or about November 30, 2001, are not reported.

JURISDICTION

The opinion of the New York Court of Appeals was decided on September 12, 2002, dismissing Petitioner's appeal and Motion for Continuation of a Stay. The opinion of the Supreme Court of New York, Appellate Division, First Department was decided and entered on June 20, 2002.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of Title 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

N.Y. Eminent Domain Procedure Law § 207, Judicial Review, provides in pertinent part,

§ 207. Judicial Review

(A) Any person or persons . . . aggrieved by the condemnor's determination and findings made pursuant to section two hundred four

> of this article, may seek judicial review thereof by the appellate division of the supreme court . . . by the filing of a petition in such court thirty days after the condemnor's completion of its publication of its determination and findings. . . .
>
> (C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:
>
> (1) the proceeding was in conformity with the federal and state constitutions,
>
> (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,
>
> (3) the condemnor's determination and findings were made in accordance with the procedures set forth in this article . . . and,
>
> (4) a *public use*, benefit or purpose will be served by the proposed acquisition (emphasis added).

U.S. Const. amend.V, provides in pertinent part,

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, provides in pertinent part,

> Section 1. [N]or shall any State deprive any person of life liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Petitioner Three O Realty LLC ("Three O") is the owner of a 16-story art deco office building, located at 263-267 West 40th Street, Manhattan, New York, within Site 8 South of the Times Square Redevelopment Project area. Although, as described in detail in the Statement of Facts below, the Times Square Redevelopment Project was commenced more than 20 years ago, in 1980, and numerous Sites within the project area have been condemned since then, until recently, no action was taken to condemn property within Site 8 South.

On November 30, 2001, Respondents New York State Urban Development Corp. d/b/a Empire State Development Corporation ("ESDC") and 42nd Street Development Project, Inc. (collectively, the "Respondents") issued a Determination and Findings for the purpose of initiating condemnation of Petitioner's property and other property located in Site 8 South. On December 31, 2001, Petitioner commenced a proceeding in the Supreme Court of the State of New York, Appellate Division, First Department (the "First Department") to review, pursuant to Section 207 of the New York Eminent Domain Procedure Law ("EDPL") the Determination and Findings. App. 5. Three other proceedings, brought by five other companies with interests in real property in Site 8 South, were also commenced to challenge the Determination and Findings.[1]

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[1] *Romack Realty Corp. v. New York State Urban Development Corp., et al.* ("*Romack*") and *632 Eighth Avenue Associates, LLC v. New York State Urban Development Corp., et al.* ("*632 Eighth Avenue*"), which were commenced on or about December 21, 2001; and *West 41st*

(Continued on following page)

Under New York law, the issuance of a determination and findings by a condemning authority is required before that authority may commence a proceeding in the Supreme Court of the State of New York, pursuant to EDPL § 204, to vest title in the authority and to determine all claims for just compensation arising from the acquisition of the property thus condemned. Under New York law, the appropriate way for an owner such as Petitioner to challenge the legality of any proposed taking of private property is to initiate a proceeding for judicial review by the appropriate department of the Appellate Division of the condemning authority's determination and findings pursuant to EDPL § 207, which provides in pertinent part:

> § 207. Judicial Review
>
> (A) Any person or persons . . . aggrieved by the condemnor's determination and findings made pursuant to section two hundred four of this article, may seek judicial review thereof by the appellate division of the supreme court . . . by the filing of a petition in such court thirty days after the condemnor's completion of its publication of its determination and findings. . . .
>
> (C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:
>
> (1) the proceeding was in conformity with the federal and state constitutions,

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Street Realty LLC, EMM Realty Corp. and Times Square Garage, Ltd. v. New York State Urban Development Corporation, et al. ("*41st Street Realty*"), which was commenced on December 28, 2001.

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with the procedures set forth in this article . . . and,

(4) a *public use*, benefit or purpose will be served by the proposed acquisition (emphasis added).

Although the entire Site 8 South ostensibly was being condemned in order to eliminate alleged "blight" in that area of the Times Square Redevelopment Project, it is undisputed that this condemnation was intended to make possible the construction of a single 1.3 million square foot building by a developer comprised of the New York Times (the "Times") and a private real estate development company. Half of this proposed "megabuilding" was to be used to house the new headquarters of the Times; the other half was to be rented out by the building's developer to private commercial tenants. In light of this fact, petitioners in all of the above proceedings (collectively, the "Proceedings"), including Three O, sought a determination from the First Department that the proposed taking of the properties in Site 8 South constituted a taking of private property for other than a public use, benefit or purpose in violation of the constitutions of the United States and the State of New York, and in violation of the statutory law of New York.

The Proceedings were consolidated for briefing, argument and decision, and, on June 20, 2002, the First Department issued its Decision and Order (the "June 20 Order") with respect to the Proceedings. In its June 20 Order the First Department affirmed the Determination and Findings, denied the applications brought pursuant to EDPL § 207, and dismissed all of the petitions (including

Three O's) in the Proceedings. The First Department specifically rejected the claim that the proposed condemnation was not for a public use and therefore violated the Takings Clause of the United States Constitution.

In so holding, the First Department refused to look behind the pretextual reason – the alleged need to eliminate "blight" in Site 8 South – that Respondents had given for the proposed taking, holding that "public purpose" was "broadly defined" and "[the court's] review on this point is limited to ascertain whether the project is rationally related to a conceivable public purpose." App. 11. The First Department held that, as long as the condemning authority articulates an acceptable public purpose (which the elimination of "blight" concededly is), and as long as the owner is not able to prove that the condemning authority is acting "irrationally" (which presumably will be impossible to demonstrate except in the most extraordinary of circumstances), a condemning authority will be permitted, under New York law, effectively to transfer property from one private owner to another.

Immediately after the First Department had issued its June 20 Order dismissing the challenge by Three O and the other owners to the proposed taking of their property, Respondents commenced a proceeding in the Supreme Court of the State of New York, County of New York under EDPL § 402 to vest in Respondents title to all of the property in Site 8 South (including Three O's) and to determine the just compensation due therefore. By virtue of such proceeding (the "Condemnation Proceeding"), which is still pending, and the papers filed in connection therewith, the ESDC is now the legal owner of all of the properties in Site 8 South, including Three O's.

On June 25, 2002, Petitioner served Respondents' counsel, and on June 26, 2002, Three O filed with the New York Court of Appeals a notice of appeal with respect to the First Department's June 20 Order, and similar appeals were filed by the petitioners in the other Proceedings. All of these appeals, including Three O's, were taken pursuant to New York Civil Practice Law and Rules § 5601(b), which provides, among other things, that an "appeal may be taken to the court of appeals as of right . . . from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." Shortly thereafter, one of the other petitioners applied to the New York Court of Appeals for a continuation of a stay with respect to the Condemnation Proceeding; in which application Three O, together with all of the remaining petitioners, joined.

After the above appeals had been filed, but before they had been briefed or argued, the New York Court of Appeals initiated a *sua sponte* review of its subject matter jurisdiction of the appeal before it – focusing on the issue of whether the condemnation violated the Takings Clause of the United States Constitution – and sought comments from all parties with respect thereto. In their response to this inquiry, petitioners-appellants (including Three O) specifically addressed the public use issue presented here.

On September 12, 2002, the New York Court of Appeals, on its own motion, in a one-sentence order (the "September 12 Order") dismissed all of the above appeals, including Three O's, on the ground that "no substantial constitutional question is directly involved." At the same time, and in the same order, the Court of Appeals denied, as "academic," the application for continuation of the stay of the Condemnation Proceeding. The Court of Appeals

thus allowed the decision of the First Department to stand as the most recent statement of New York law with respect to a private landowner's rights – or lack of rights – in the context of condemnation.

Facts

Petitioner Three O Realty and the Property

Petitioner Three O Realty is a domestic limited liability company started by three brothers – Joseph, Marcus and Sidney Orbach – and since 1979 Three O or its predecessors have been the owner in fee simple of the property located at 263-267 West 40th Street, Manhattan, New York, and all improvements located thereon (the "Property"). The Property is located within the area designated as Site 8 South of the Times Square Redevelopment Project. The Times Square Redevelopment Project includes twelve numbered "sites" in the Times Square area of Manhattan (the vicinity of 42nd Street and 7th and 8th Avenues). Site 8 South comprises the property across the street from the Port Authority Bus Terminal, bordered by 41st Street on the north, 40th Street on the south, and Eighth Avenue on the west, and extending east of Eighth Avenue approximately one-half block.

The Property, which has been owned by Three O or its predecessors since 1979, is a commercial 16-story office building with approximately 110,000 square feet of retail space. Since 1998, Three O has made significant investment to renew and refurbish the Property in order to attract and retain a diverse roster of high-quality tenants.

As of the date of the proceedings herein, such tenants included a major designer – Donna Karan – which rented two floors in the Property, for a show room, work area and

offices. Other tenants included a long-established and well known fabric retailer, various fabric wholesalers, and a number of architectural, design and engineering firms.

The Times Square Redevelopment Project

The history of the Times Square Redevelopment Project (the "Project"), insofar as it is relevant to this application, can be briefly summarized:

The Project was commenced in 1980 by a memorandum of understanding between the City of New York and the ESDC, which stated that the Times Square area was "marked by street crime, substandard and unsanitary conditions, undesirable uses and physical and social blight" warranting "public action to cause the replanning, clearance, reconstruction, redevelopment and rehabilitation of the Project Area."

On or about October 4, 1984 the ESDC issued a Determination and Findings approving the Project and made findings that authorized the ESDC to acquire, by condemnation if necessary, the real property within the Project area. The central focus of the Project, as described in the 1984 Determination and Findings, was the construction of new office buildings on Broadway and Seventh Avenue, and the reconstruction of the theaters located on the north and south sides of the mid-lock of 42nd Street between Broadway and Eighth Avenue. With respect to Site 8, the 1984 Determination and Findings contemplated the construction of a merchandise mart linked to the Port Authority Bus Terminal by a pedestrian bridge.

Prior to the 1984 Determination and Findings, the ESDC prepared (apparently in 1981) a 26-page "Basis of

Blight Finding." That document discussed 10 separate factors from which a determination of blight might be made with respect to the Times Square area generally, and also included numerous tables summarizing supporting data. Thereafter, in 1984, at the same time the 1984 Determination and Findings were issued, a seven-page "Addendum to Basis for Blight Finding" was also issued with respect to the Project area generally. At that time, no blight findings were made specifically with reference to Site 8 South.

In 1990, the ESDC took title by condemnation to nine of the 13 acres within the Project area. Site 8 South was not included in this initial acquisition, and the merchandise mart which the 1984 Determination and Findings had proposed for Site 8 was never built.

On or about January 27, 1994 the ESDC issued its Determination and Findings updating its 1984 Determination and Findings (the "1994 Determination and Findings"). The 1994 Determination and Findings set forth a number of possible alternatives for Site 8 South. One alternative included a wholesale mart/office building and residential development. Another suggested eliminating Site 8 South from the Redevelopment Project altogether.

The Proposed Deal with the New York Times

No further action to develop Site 8 South was taken until October 1999, when ESDC secretly began negotiations with the New York Times regarding the possibility of relocating the headquarters of the Times from West 43rd Street.

In June 2000, ESDC and its wholly-owned subsidiary 42DP entered into a memorandum of understanding with the Times and Forest City Ratner Companies ("FRT") wherein the ESDC would condemn Site 8 South, and 42DP would lease it to a joint venture consisting of the Times and FRT (collectively, the "Developer") under a long-term ground lease for the construction of a huge office building, half of which would be occupied by the Times as its headquarters, and the other half of which would be rented out by the Developer to other tenants.

In August 2000, shortly after the conclusion of the memorandum of understanding – and more than a year after Three O made a significant investment to upgrade the Property – the ESDC notified Three O that its property was located within the Times Square Development Project area, and, purportedly pursuant to Section 302 of the EDPL, ESDC requested certain information in order to determine the value of the Property. As a result of this notification, and the publicity surrounding the possible condemnation of the Property, a shadow of condemnation was created and there was an immediate and substantial decrease in interest on the part of potential tenants, existing tenants were bombarded with proposals for relocation by real estate brokers, and the Property's occupancy rate decreased precipitously.

The ESDC Acts to Validate Its Decision to Condemn Site 8 South

In August 2001 – seven years after it had considered excluding Site 8 South from the Redevelopment Project altogether and a year after it had decided to enter into the deal with the Times, the ESDC started to take practical

measures (including publicizing the impending condemnation of Three O's property) incidental to condemnation – the ESDC's Board of Directors apparently adopted formal resolutions approving the holding of a public hearing with respect to the Times deal. A memorandum submitted to the Board of Directors in support of these resolutions describes the proposed deal with the Times in some detail, but does not assert that proposed project is required to eliminate "blight" in Site 8 South. Instead, the memorandum refers to four other memoranda (prepared by a person, or persons, unidentified in the record) that supposedly support a finding of "blight" at this location.

The first three such memoranda – the June 1981 Basis for Blight Findings, the 1984 Addendum thereto, and a 1993 Second Addendum – relate not to Site 8 South in particular, but to the Times Square Project area as a whole. Moreover, these memoranda predate by many years – and, in the case of the 1981 document, predate by nearly two decades – the proposed deal with the Times. The relevance of any of these memoranda, on which ESDC purports to rely in support of its proposed taking of private property, thus is questionable, at best.

The fourth and last such memorandum – a two-page "Third Addendum" dated August 23, 2001 (which, unlike the three earlier memoranda, does purport to relate specifically to Site 8 South) – relies not on detailed findings of fact, but on subjective opinions. In particular, the Third Addendum states that the site is "underutilized," presents a "shabby front entrance" to the Project, and still has "uninviting" street conditions. Significantly, however, these opinions (issued by a person or persons unknown) are totally unsupported by any objective evidence. Indeed, the contrast between the perfunctory "Third Addendum"

and the lengthy and detailed "Basis of Blight Finding" that had been made 20 years earlier, at the inception of the Project, is striking, and highlights the total inadequacy of the latter document to support any finding of present "blight."

In September 2001, the ESDC published its notice of public hearing (the "Notice") with respect to its proposed deal with the Times. In its Notice, the ESDC essentially presented the condemnation of Site 8 South as a fait accompli. According to the Notice, the ESDC intended to acquire the project site "by exercise of its statutory power of eminent domain, with or without negotiated agreement." After such acquisition, the ESDC would convey the project site to 42DP; 42DP would then enter into a 99-year lease with the Developer; the Developer would erect a new building, totaling approximately 1,370,000 square feet, on the site; and the Times would be the major tenant in the new structure, taking a minimum of approximately 700,000 square feet. *See also* David W. Dunlap, Blight to Some Is Home to Others, NY Times, Oct. 25, 2001, p. A18 (National ed.) (reporting that the Times will acquire the land for the advantageous price of $62/sq.ft., as compared to $130/sq.ft. recently paid for nearby comparable parcel in private transaction).

The Notice further stated that the Developer would pay the costs of acquiring the site (the "SAC") up to $84,940,000, and that if the total SAC was more than that amount, the Developer would be entitled to recover such excess from the public, in the form of a credit against the rent it would otherwise pay under its lease with 42DP.

The Public Hearing

On September 24, 2001, the ESDC conducted a public hearing, purportedly in compliance with EDPL § 201, to inform the public of the proposed acquisition, to review the project's public use and to consider the impact on the environment and residents of the locality where the project would be constructed. Although the eight-page Notice contained a single sentence in which the ESDC stated that "[t]he public use of the [New York Times] Project is to . . . restore a blighted, deteriorated, substandard, unsanitary and underutilized site to full productive use," nothing in the Notice invited public comment on whether Site 8 South was in fact "blighted," and nothing in the Notice gave any indication of the existence (or, the nonexistence) of "blight."

At the September 2001 hearing, all of the petitioners, including representatives of Three O, objected to the proposed condemnation. Petitioners noted that the proposed taking was illegal (inasmuch as it was for a private use, and inasmuch as the ESDC itself was responsible for the "underutilized" condition of Site 8 South) and unnecessary (inasmuch as the Times Square area was no longer "blighted" and could, in any event, be developed by private companies, without the need for condemnation and use of public funds).

Petitioners also noted that – given the price at which an adjoining parcel of land had recently been sold at a private auction, and also given the prices that had been realized on other sales of similar parcels – the cost of acquiring the property in Site 8 South might well be three or four times the $84,940,000 which the Developer was required to pay; that this excess cost was a cost which the

public would have to bear; and that the net effect of the proposed transaction was a huge subsidy of the Times and a waste of public funds.

The Determination and Findings

On or about November 30, 2001, the ESDC issued its Determination and Findings, purportedly in compliance with EDPL § 204, by which Respondents determined to acquire by condemnation Site 8 South. In its Determination and Findings, the ESDC acknowledged that "there [had] been substantial improvement within the 42nd Street Project area since April 1990;" that "the 42nd Street Project has begun to reverse the area's decline and restore its prominence and productivity;" and that there was already in progress a "metamorphosis of the 42nd Street Project area from a seedy district to a vibrant center of entertainment, commerce and tourism."[2]

Notwithstanding the above, and notwithstanding the common knowledge that the Times Square area of today is vastly different from the Times Square area of 20 years ago, the ESDC stated in its Determination and Findings that Site 8 South was still blighted, and that such allegedly "blighted condition" "hamper[ed] development of the area's enormous potential." Despite the 1994 finding that 8 South did not even need to be taken in order to meet the goals of the 42nd Street Redevelopment Project, after

[2] Petitioners do not accept as fact ESDC's self-congratulatory attribution of improvements in the Times Square area to the Project. Much of it has to do with more vigorous law enforcement, especially with respect to "lifestyle crimes" and the general prosperity of New York City and Manhattan in particular.

making the deal with the New York Times in 1999, the 2001 Findings and Determination state that the "need for the Site 8 South component of the 42nd Street Project remains compelling."

The only factual support for "blight" conditions in 8 South as of 2001 appeared in an expert's report commissioned by the ESDC, after it already had determined to condemn the property. In a total of only two paragraphs devoted to the issue of "blight," he noted no criminal activity in 8 South and based his entire argument about "blight" on the presence of some "adult-related businesses." He could have said, but did not, however, that there has been improvement on this score, because as he notes, New York's 1995 adult zoning regulations forced the "adult related" businesses to reduce the percentage of their inventory solely devoted to adult materials and to alter their signage.

As the above makes clear, the "finding" that Site 8 South is "blighted" was not supported by reference to any specific facts. Instead, that "finding" was but a pretext designed to support the ESDC's determination to acquire Site 8 South "by exercise of its statutory power of eminent domain, with or without negotiated agreement." Indeed, not only is it clear from the documentary evidence that the ESDC's "blight" finding was predetermined well in advance of the public hearing; it is equally clear that such a "finding" was a foregone conclusion – regardless of what the actual facts were – once the ESDC decided – in 1999 – to negotiate a deal with the Times. The "finding" of "blight" – being a mere pretext – thus should not have been given any weight at all by any court reviewing the constitutional propriety of the condemnation here; and, accordingly, such "finding" cannot, and should not, be the

basis upon which private property is taken from its lawful owner.

REASONS FOR GRANTING THE WRIT

This case squarely presents an important federal question of pressing national concern over which there is a split, that has been percolating for a decade, and regarding which the lower courts have requested guidance: whether the Takings Clause's "public use" requirement may be satisfied by pretextual findings of blight.

I. Whether the Takings Clause's "Public Use" Requirement May Be Satisfied by Pretextual Findings of Blight Is an Important Federal Question of Pressing National Concern

The Fifth Amendment's Takings Clause, which is incorporated as a limitation on the States by the Fourteenth Amendment, requires that all takings of private property by the government be taken for "public use." U.S. Const. amend. V; *see also Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897) (holding that the public use clause applies to the states via the Fourteenth Amendment). A number of years ago, this Court interpreted "public use" broadly to permit local governments to take private property to remedy "blight." *Berman v. Parker*, 348 U.S. 26, 34-35 (1954). It affirmed this approach in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and in *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992). While this Court's "public use" doctrine has given broad latitude to local and state governments to effect constitutional takings, this Court never

has retreated from the Constitution's plain language that all takings must serve a "public use."

Almost fifty years after this Court's first decision detailing the "public use" analysis, *Berman*, private property owners in different jurisdictions have decidedly different rights to protect their property from arbitrary government action. With private property the keystone of the United States' constitutional order, *see* The Federalist No. 54, at 370 (J. Madison) (stating that government is instituted for "protection of the property . . . "); *see also* Richard Epstein, *History Lean: the Reconciliation of Private Property and Representative Government*, 95 Colum. L. Rev. 591, 594, 599 (1995) ("[T]hese republican institutions [the President, Senate and House] were a means to an end . . . in large measure to do with the preservation of property in the broad [John] Lockean sense" and noting the Founders were concerned about the protection of individual property rights."); Carol M. Rose, *Property as the Keystone Right?*, 71 Notre Dame L. Rev. 329, 363 (1996), the development of a patchwork of property rights against arbitrary government action is a matter of pressing national concern.

Following *Berman*, the states passed laws defining "blight" in very different ways, creating a literal spectrum of property rights. For example, California's Community Redevelopment Law, Health & Safety Code § 33030, limits "blight" to "predominantly urbanized" areas where there is "prevalent and substantial" underutilization of land to the extent that it "constitutes a serious physical and economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment." Conversely, New York's Municipal Development Law, NY

CLS Gen. Mun. Law § 970-c, defines "blight" extremely broadly as lack of fitness or safety or economic unproductivity.

The broad power the states have to define "blight" coupled with this Court's broad reading of "public use" has resulted in some governments using so-called "blight findings" as a pretext to transfer private property arbitrarily to other, favored private owners. As a result, this Court's public use doctrine has become a vehicle to get around the Fifth Amendment's "public use" requirement. Under the public use doctrine in many jurisdictions, "local governments can condemn property for private profit-making enterprises at the expense of individual homeowners and small businessmen who are unable to stand up to city hall and its big business allies." Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. Pub. Int. L.J. 335, 335 (2001); *see also* Gideon Kanner, *That Was the Year That Was: Recent Developments in Eminent Domain Law*, SF08 ALI-ABA 87 (2000) ("[I]t has become clear that the term 'urban redevelopment' has shed its original meaning as a technique used to clear slums and urban blight, and has become simply another way of [re] developing land for unabashedly private purposes.").

In light of this trend, courts have sought ways to ensure a taking is actually for a public use. In some jurisdictions, in addition to applying abuse of discretion review to the government's findings and rationality review to its legal conclusions, courts have made further inquiries to ensure the Fifth Amendment's "public use" mandate is met. Most notably, many courts have crafted a requirement that the government demonstrate that its findings are "actual" and not "pretextual," instead of acting as a rubber stamp to the actions of the executive branch.

New York takings law currently operates as a rubber stamp on the decisions of local and state administrators, and it does not provide the additional safeguards rightly found necessary in other jurisdictions. "Blight" in New York has "acquired a meaning that bears little relation to what an intelligent, English-speaking person might suppose that term to mean." Kanner, *supra*. Because of the extreme deference accorded the redevelopment authorities in New York, the pretextual blight findings in this case were sufficient for the ESDC to take Petitioner's building solely to benefit the New York Times and Forest City Ratner Companies, without judicial consideration whether the government supported its claim of blight or merely asserted it as a pretext.

This case, thus, presents an important federal question of pressing national concern. The Takings Clause issue in need of this Court's certiorari review is: May a government take private property that was declared to be part of a "blighted" site twenty years earlier when, in fact, the property itself was never blighted, the property's owner itself has made major improvements to the property so as to retain "first class" tenants, the surrounding area has shown dramatic improvement through less invasive and less restrictive regulatory reforms, the government indicated in 1994 it would not need to take the property, and the most recent blight "findings" are a pretext to force private property from one owner to another, more politically powerful private owner. The issue, in short, is whether a state or local government may take private property to give to another private owner on the basis of pretextual blight findings.

This issue requires this Court's review, because (1) there is a split in the Circuits and the state courts on the

issue, (2) the issue has been percolating for many years, and (3) the lower courts are asking this Court to provide guidance. This is also a good case for the presentation of this issue, because there are no procedural reasons to deny certiorari and no additional issues that would preclude a holding on this key issue.

A. There is a split in the Circuits and the State Courts on whether pretextual blight findings may satisfy the Takings Clause's "public use" requirement

As the takings law now exists, a private property owner has decidedly more rights to forestall a taking in some states than in others. The "public use" restriction has no teeth in the state of New York, while it is being more vigilantly enforced in other jurisdictions.

While the lower courts apply deferential review to examine whether a taking is for a "public use," as required by this Court's cases, some jurisdictions have added additional protections to ensure that such review does not eliminate the public use requirement altogether. The most pronounced trend, and the one that is central to this case, is to add an inquiry into whether the government's stated reasons for a taking are "actual" or "pretextual." *See Housing and Redev. Auth. v. Walser Auto Sales, Inc.*, ("*Walser I*"), 630 N.W.2d 662, *reh'g granted*, 2001 Minn. LEXIS 659, *aff'd*, 641 N.W.2d 885 (affirming rubber stamping of blight findings for purpose of public use analysis but also finding not moot), *reh'g denied*, 2002 Minn. LEXIS 382, *cert. denied*, 123 S. Ct. 437 (2002); *Walser Auto Sales, Inc. v. City of Richfield*, ("*Walser II*"), 635 N.W.2d 391, *reh'g granted*, 2002 Minn. LEXIS 12, *aff'd*, 644 N.W.2d 425 (2002) (affirming blight findings

were pretextual); *AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284, 300 (Conn. 2001) (condemnation of property owner's land was found to be a pretext to prevent him from developing complex for affordable housing which was permitted by zoning ordinance); *Fitzke v. City of Hastings*, 582 N.W.2d 301 (Neb. 1998) (finding blight determination issued to expand building project through eminent domain unsupported); *City and County of Denver v. Block 173 Assocs.*, 814 P.2d 824 (Colo. 1991) (where actual purpose of urban renewal law was not elimination of blight, land could not be condemned); *Johnson v. Redev. Agency*, 913 P.2d 723 (Utah 1995) (requiring strict compliance with state law mandating blight findings); *Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708 (Ky. 1990) (finding blight determination a pretext for taking of private property without public purpose); *Baltimore v. Chertkof*, 441 A.2d 1044 (Md. 1982) (stating that condemnation of private property simply to transfer to another industry is a pretext for the blight finding necessary to justify taking); *Redevelopment Auth. v. Owners or Parties in Interest*, 274 A.2d 244 (Pa. 1971) (court found evidence of "palpable bad faith" when redevelopment authority refused to allow property owners to improve blighted condition of property and sole purpose of taking was to relocate a private owner's store); *see also 99 Cents Only Stores v. Lancaster Redev. Agency*, 2001 WL 811056 (CD Cal. 2001) (court holds "no judicial deference is required . . . where the ostensible public use is demonstrably pretextual"); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 109-11 (NJ Super. Ct. Law Div. 1998) (condemnation of land set aside where court found underlying purpose found to serve private interest of casino developer, rather than a public interest); *Earth Management Inc. v. Heard County*, 283 S.E.2d 455, 459 (Ga. 1981) (condemnation of land found to be unauthorized

and in bad faith where stated goal of creating a public park was a subterfuge to prevent construction of waste facility on the land); *Pheasant Ridge Assoc. Ltd. Partnership v. Burlington*, 506 N.E.2d 1152, 1155-58 (Mass. 1987); *City of Miami v. Wolfe*, 150 So.2d 489, 490 (Fla. 1963) (condemnation suit brought by city found to be in bad faith and an abuse of discretion where true purpose was for it to acquire valuable riparian rights of property owners, rather than for the public purpose of extending a road); *Denver W. Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo. App. 1989) (court dismissed condemnation action to obtain a right of way to re-channel stream where it found primary purpose was to advance private interests, even if some public benefit was served, stating "the existence of an incidental public benefit does not prevent a court from finding bad faith."). These jurisdictions have added this "actual" or "pretextual" blight inquiry to ensure the Fifth Amendment's "public use" requirement is not a chimera.

Those jurisdictions inquiring whether blight is actual or pretextual are in sharp contrast to others, which rubber stamp the government's blight findings. *See, e.g., Jackson v. New York State Development Corp.*, 494 N.E.2d 429, 444 (N.Y.1986) (finding New York Urban Development Corporation could rely on another agency's prior findings to conclude that redevelopment plan was not environmentally significant and did not have to disclose the raw data underlying its conclusions concerning traffic congestion to the public); *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 45-46 (2d Cir. N.Y.1985) (where court deferred to local authorities' declaration that the blighted area near appellants' building was enough to allow said building to be condemned, stating action was "a

classic example of a taking for public use or purpose," despite the fact that building itself was "structurally sound, fully utilized and not blighted or substandard" and would be sold to private developers); *see also Birmingham v. Tutwiler Drug Co.*, 475 So. 2d 458 (Ala.1985) (finding whether block itself was blighted or not, it could legitimately be condemned because "indicia" of blight existed and redevelopment was justified based on the city council's declaration that it *may* reduce blight in other parts of downtown area and such determination was within its power). In the state of New York, which is the situs of the dispute in this case, the government has the most power to take property with very little justification or judicial oversight.

There was a time in New York, when the Court of Appeals was not so willing to rubber stamp whatever a redevelopment authority demands. In *Yonkers Community Development Agency v. Morris*, 335 N.E.2d 327, 333, *appeal dismissed*, 423 U.S. 1010 (1975), the court stated:

> Carefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so. (citation omitted)

Were this Court to grant certiorari in this case, Petitioner would urge the Court to return New York to this more responsible reading of the Takings Clause's "public use" requirement that findings of blight be supported by facts and not general statements or proclamations.

If this Court were to decide to take up the issue, there are strong reasons to grant certiorari in this particular case. Petitioner invested in property and a building, following which the government threatened to condemn it for a span of twenty years. The Orbach brothers did their best to use the property in the shadow of condemnation, obtaining excellent lessees such as designer Donna Karan and investing significant sums to improve the property. This property was never blighted, and over the course of the twenty years, the conditions justifying the taking in the 42nd Street Project improved dramatically through enforcement of the City's adult business ordinances, better police oversight, and improvement of the worst buildings. *Stringfellow's of New York v. City of New York*, 694 N.E.2d 407, 415-418 (1998) (discussing improvement of area); *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 188-89 (N.Y. 2001) (same); *Hickerson v. City of New York*, 146 F.3d 99, 104-7 (2d Cir. N.Y. 1998) (same); *Buzzetti v. City of New York*, 140 F.3d 134, 136-38, 140-41 (2d Cir. N.Y. 1998) (cases upholding challenges to New York City Amended Zoning Resolution, § 12-10; § 32-01; § 42-01). The conditions improved so much, in fact, that the government declared it did not need to take the site, 8 South, on which the property sits.

After the blight conditions were ameliorated, the New York Times entered the picture and sought condemnation in order to avoid entering the free market. Only at this point – after the blight had been ameliorated and after making a deal with the New York Times – did the ESDC then take the property.

The taking was not a taking for the public purpose of removing blight, but solely for the purpose of transferring private property to another, more powerful and

"connected" private owner, the New York Times. The so-called blight findings immediately preceding the taking were merely a pretext for this blatant handover of private property to another private owner without a public purpose. This case demands the approach used by those courts that forbid the government to arbitrarily take property on the basis of pretextual blight findings.

Under the standards in many other states – which permit a private property owner to show that blight findings are pretextual – Petitioner may well have been able to fight the taking, but under the New York standards, Petitioner had no chance. In another state, if the New York Times wanted the Orbachs' property, it would have had to buy it from them on the open market. In this case, "[n]aked and unconditional governmental power" has been used "to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit." *Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708, 711 (Ky. 1990).

The New York law is clearly out of step with the trend in the states to examine whether blight findings are actual or pretextual, and should be declared constitutionally insufficient to protect the interests of private property owners under the Takings Clause. If this Court were ever going to draw a line on the meaning of "public use," and in particular a line short of the carte blanche power granted by New York doctrine, this is the case that demands the Court's attention.

The taking here was so unremarkable under New York law that the New York Court of Appeals refused to review the taking when Petitioner filed for certiorari, and dismissed its motion for a stay "as academic." *West 41st St.*

Realty LLC v. N.Y. State Urban Dev. Corp., 2002 N.Y. LEXIS 2384 (N.Y. Sept. 12, 2002) (denying appeal and dismissing motion for continuation of stay). This uneven protection of private property rights – which are the foundation of this constitutional order – between the states demands this Court's attention and correction.

B. The issue has been percolating for a number of years

This Court rarely has visited the issue of the definition of "public use" in the Takings Clause. Its decisions in *Berman*, *supra*, *Midkiff*, *supra*, and *National R.R. Passenger Corp.*, *supra*, are the only guideposts provided to date. It has been a decade since this Court last visited the issue, and an ever-expanding desire of local and state governments to exercise the power of eminent domain has propelled some courts to institute more searching scrutiny. *See Walser, supra; AvalonBay, supra; Fitzke, supra; Block 173 Associates, supra; Johnson, supra; Prestonia, supra; Chertkof, supra; Owners or Parties in Interest, supra; 99 Cents Only Stores, supra; Casino, supra; Earth Management, supra; Pheasant Ridge, supra; Wolfe supra;* and *Geudner*, *supra*, for examples of inquiries courts have made into stated reasons for takings. The result is a patchwork of standards in different jurisdictions, with some trying to remain faithful to the Fifth Amendment's explicit requirements, while others have taken dicta in this Court's "public use" cases to an extreme, abandoning any meaningful scrutiny. The result is confusion and a need for this Court to step in and clarify the Constitution's public use requirement.

C. The lower courts need and have asked this Court for guidance

As Justice Roberts noted in *Price v. Philadelphia Parking Authority*, 221 A.2d 138, 145 (1966), the courts bear responsibility to keep a "check rein" on public authorities that act arbitrarily and capriciously. In exercising their responsibility to serve as a "check rein" on takings authorities, a significant number of courts are now inquiring whether the findings underpinning the taking are actual or pretextual.

The lower courts also have asked explicitly for further guidance from this Court. In a takings case decided in the United States Court of Appeals for the Ninth Circuit, Judge O'Scannlain plainly and eloquently asked this Court for guidance: "Although *Midkiff* has not been overruled, and although *Nollan* [*v. California Coastal Comm'n*, 483 U.S. 825 (1987)], *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] and *Dolan* [*v. City of Tigard*, 512 U.S. 374 (1994)], deal with a different part of the Takings Clause, I nevertheless believe that there is tension between these two lines of authority. The underlying thrust of the *Nollan-Lucas-Dolan* decisions – increasing the scrutiny of regulations to determine if they go "too far" (enough to require compensation) – is inconsistent with *Midkiff's* sweeping deference. It may be time for the Supreme Court to reconsider *Midkiff*. . . . Hopefully the Supreme Court will have the opportunity to extend its emerging takings jurisprudence to protect the right to exclude and to add vitality to the public use requirement." *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1167-1168 (9th Cir. Haw. 1997) (O'Scannlain, J., concurring in part, dissenting in part).

The tortured reasoning in some cases also illustrates the necessity for this Court's intervention. In *Walser I, supra*, and *Walser II, supra*, the appeals of two contemporaneous actions involving the same property, one challenging the grant of a quick take condemnation of a development and the other challenging its inclusion in a tax increment financing district, each produced different results from an evenly divided state supreme court. *See Housing & Redevelopment Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, *reh'g granted*, 2001 Minn. LEXIS 659, *aff'd*, 641 N.W.2d 885, (affirming rubber stamping of findings for purpose of public use analysis), *reh'g denied*, 2002 Minn. LEXIS 382, *cert. denied*, 123 S. Ct. 437 (U.S. 2002); *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, *reh'g granted*, 2002 Minn. LEXIS 12, *aff'd*, 644 N.W.2d 425 (2002) (affirming blight findings were pretextual).

The New York courts' overly deferential review of the public use requirement is out of step with a number of states, and the taking in this particular case is particularly egregious. For all of these reasons – an important federal question, a split, long percolation, and request for guidance – this Court should grant certiorari to review whether pretextual blight findings may support the required finding of "public use" under the Takings Clause.

CONCLUSION

Private property is the foundation of the American system of democracy and free enterprise. When the government can arbitrarily take property based on pretextual

factfindings and transfer it to another, favored property owner, the constitutional order is seriously threatened.

Although eminent domain laws fall under the police powers of the state and local governments, they are limited by the Fourteenth Amendment's requirement not to deprive persons of property without due process of law, which incorporates the Fifth Amendment's Takings Clause. If this Court leaves the issue whether a taking is for a public use wholly to the political branches of government, then pretextual takings such as the one in this case are likely to become the order of the day, and not the exception.

For all of the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review and correct the judgment of the court below.

Respectfully submitted,

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 493-1973
(215) 493-1094 (fax)
hamilton02@aol.com

Counsel of Record

MARK I. SILBERBLATT, ESQ.
NOVACK BURNBAUM CRYSTAL, LLP
300 East 42nd Street
New York, NY 10017
(212) 682-4002
(212) 986-2007 (fax)
msilberblatt@nbclaw.com

DATED: December 11, 2002

[LOGO]

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York
12207-1095

DECISION September 12, 2002

On the Court's own motion, appeals dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Motion for continuation of stay dismissed as academic.

Mo. No. 767

In the Matter of West 41st Street Realty LLC, et al.,
Appellants,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of 632 Eighth Avenue Associates, LLC,
Appellant,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of Romack Realty Corp.,
Appellant,
v.

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of Three O Realty LLC,
Appellant,

v.

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth ***day of*** September 2002

present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 767

In the Matter of West 41st Street Realty LLC, et al.,
Appellants,

v.

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
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In the Matter of 632 Eighth Avenue Associates, LLC,
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In the Matter of Romack Realty Corp.,
Appellant,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

In the Matter of Three O Realty LLC,
Appellant,
v.
New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,
Respondents.

The appellants having taken appeals to this Court and a motion for continuation of stay to the Court of Appeals having been made in the above causes, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeals be and the same hereby are dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for continuation of stay be and the same hereby is dismissed as academic.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

SUPREME COURT, APPELLATE DIVISION

First Department, April 2002

David B. Saxe, J.P.
John T. Buckley
Ernst H. Rosenberger
David Friedman
George D. Marlow, JJ.

In re Application of West 41st Street Realty LLC, et al.

Petitioners,

-against-

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al., 938 [M-7263]

Respondents.

- - - - -

In re Application of 632 Eighth Avenue Associates, LLC,

Petitioner,

-against-

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al., 939 [M-7234]

Respondents.

- - - - -

In re Application of Romack Realty Corp.,

Petitioner,

-against-

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,

Respondents.

940
[M-7235]

- - - - -

In re Application of Three O Realty LLC,

Petitioner,

-against-

New York State Urban Development Corporation, d/b/a Empire State Development Corporation, et al.,

Respondents.

941
[M-7285]

By application pursuant to Eminent Domain Procedure Law

§ 207, petitioners seek review of the determination and findings of respondent New York State Urban Development Corporation, issued on or about November 30, 2001, which directed that respondent Empire State Development Corporation exercise its power of condemnation in order to acquire, as necessary, real property designated Site 8 South within the 42nd Street Project.

Guy Miller Struve, of counsel (Rebecca L. Winters, Laura Ann Rosenbury and Lorilee A. Vaughan, on the

brief, Davis Polk & Wardwell, attorneys) for petitioners West 41st Street Realty LLC, EMM Realty Corp. and Times Square Garage, Ltd.,

Donna-Marie Korth, of counsel (M. Allan Hyman and Edward G. McCabe, on the brief, Certilman Balin Adler & Hyman, LLP, attorneys) for petitioners 632 Eighth Avenue Associates, LLC and Romack Realty Corp.,

Mark I. Silberblatt, of counsel (Novack Burnbaum Crystal LLP, attorneys) for petitioner Three O Realty LLC,

John R. Casolaro, of counsel (Joseph M. Ryan and Susan B. Kalib, on the brief, Carter, Ledyard & Milburn, attorneys) for respondents New York State Urban Development Corporation, d/b/a Empire State Development Corporation, and 42nd St. Development Project, Inc.

BUCKLEY, J.

This original proceeding, brought pursuant to Eminent Domain Procedure Law § 207, involves the well-publicized and previously litigated renovation of Times Square (*see, e.g. Jackson v New York State Urban Development Corp.*, 67 NY2d 400). Specifically, six real property owners challenge a determination and findings of respondent New York State Urban Development Corporation (UDC) to authorize condemnation and acquisition of real property designated as Site 8 South comprising land across Eighth Avenue from the Port Authority Bus Terminal, a parcel which has been marked for condemnation for some time. Since we find that there is sufficient public purpose warranting respondent's determination to initiate

condemnation and that petitioners have failed to demonstrate any other legal infirmity in the UDC determination, we confirm the determination and dismiss this proceeding.

Section 207 of the Eminent Domain Procedure Law limits the scope of our review to whether: (1) the condemnation proceedings were constitutional; (2) the proposed acquisition is within the statutory jurisdiction of the condemnor; (3) the condemnor's determination and findings were made in accordance with relevant provisions of the Eminent Domain Procedure Law and the Environmental Conservation Law; and (4) the proposed acquisition will serve a public use, benefit or purpose (*Pizzuti v Metropolitan Transit Authority*, 67 NY2d 1039, 1041; *Congregation Gates of Prayer of Far Rockaway v New York City School Constr. Auth.*, 286 AD2d 439). Petitioners argue that the proposed taking should be barred because the benefit inures to a private party, viz. The New York Times. They also allege a taking in violation of due process protections of the state and federal constitutions on the ground that the UDC itself created any "blight" which justifies condemnation since the UDC made it impossible for the owners to reap the value of their land during the last twenty years. Notably, petitioners do not seek judicial relief on either the second or third statutory grounds, so we proceed on the assumptions that the proposed acquisition is within the statutory jurisdiction of the UDC and that the UDC has otherwise complied with relevant provisions of the Eminent Domain Procedure Law and the Environmental Conservation Law. A review of the procedural history preceding this action is necessary to understand the context in which petitioners raise their alternate claims of insufficient public use and inordinate delay in effecting condemnation.

Since 1968, the UDC has been authorized to acquire any real property pursuant to the Eminent Domain Procedure Law if it finds that such acquisition would be necessary or convenient for its purposes (McKinney's Uncons Laws of NY § 6263). Based on legislative findings that many existing industrial, manufacturing and commercial facilities in New York's urban areas have become obsolete, dilapidated or underutilized and that such conditions contribute to a wide range of social problems, the UDC was created to engage in a variety of activities to facilitate the acquisition, construction, reconstruction, rehabilitation or improvement of industrial, manufacturing and commercial facilities (McKinney's Uncons Laws of NY § 6252). When considering land use improvement projects, the UDC is required to find that: (1) the proposed project site is substandard or unsanitary and impairs sound growth and development; (2) there is a plan for clearance, replanning, reconstruction and rehabilitation of that area; and, (3) the plan affords maximum participation by private enterprise (McKinney's Uncons Laws of NY § 6260[c]). The real estate involved here, denominated Site 8 South, fronts on Eighth Avenue from 40th to 41st Streets, running halfway toward Seventh Avenue. Petitioners own separate portions of Site 8 South.

The UDC began involvement with redeveloping Times Square with its execution of a memorandum of understanding in 1980 followed by a general project plan in 1984. The New York City Board of Estimate authorized development of sites later that year based on UDC plans to develop the West 42nd Street area to overcome blight, physical and economic decay, and crime and frightening street life. The Court of Appeals upheld UDC's exercise of eminent domain power when community residents, area

businesses and property owners challenged various aspects of these plans (*Jackson v Urban Development Corp.*, 67 NY2d 400).

The 42nd Street Development Land Use Improvement Project aimed at revitalization of approximately 13 acres of land in the Times Square area of midtown Manhattan. The earliest redevelopment plans called for a retail mart on Site 8 with a pedestrian bridge to the Port Authority terminal. Empire State Development Corporation (ESDC), a subsidiary of UDC, has carried out the project in successive stages: (1) taking title to nine acres in 1990; (2) acquiring Site 7 in 1994; and (3) acquiring Site 8 East in 1995. Site 8 South and Site 3 North remain the last privately held sites in this project's area. Revised plans in 1994 deferred the retail mart while entertainment and tourism were developed on Site 8 North, on Eighth Avenue between 41st and 42nd Streets. Negotiations between ESDC and The New York Times begin in late 1999 and produced a memorandum of understanding in June 2000 which contemplated that ESDC would condemn Site 8 South and lease it to the Times. A high rise office tower would be built at Site 8 South providing the Times with a new headquarters, as well as providing 700,000 square feet of space for other office tenants. The tower would additionally include condominiums, a new subway entrance, mandatory ground-floor public amenities, a 350-seat auditorium, a gallery and retail space. Witnesses at a public hearing conducted by ESDC in 2001 testified that this project would keep the Times headquartered in Times Square, add needed office space, create employment, increase retail revenue, attract further economic improvement to the larger area, and address a critical shortage of commercial space. Other testimony detailed how the

proposal would provide a needed spur to Eighth Avenue development by linking the renovated Penn Plaza in the 30s with the Worldwide Plaza in the 50s. Other witnesses testified that much of the original blighted condition of the Site 8 South area remained unchanged during the past two decades. The businesses in the site include five adult entertainment centers and low-end retail and food establishments. An active street drug trade persists.

Project opponents contended that urban blight had been virtually eliminated in the project area. Alternatively, to the extent that urban blight remained, opponent witnesses claimed that private development had been effectively precluded due to the potential for condemnation which had existed for twenty years.

The eminent domain power does not originate in the constitution but is a "necessary attribute of sovereignty. . . . The power of eminent domain is the right of the State, as sovereign, to take private property for public use upon making just compensation" (*People v Adirondack Railway*, 160 NY 225, 236-237, *affd* 176 US 335). Of the two limitations on the exercise of this power, only public use is at issue here. Exercise of the eminent domain power cannot be for the sole benefit of a private party (*Thompson v Consolidated Gas Utilities Corp*, 300 US 55). Public use only requires "an evident utility on the part of the public" (*Bloodgood v Mohawk & H.R.*, 18 Wend 9). While a public benefit or use must be present, it is "broadly defined" and our review on this point is limited to ascertain whether the project is rationally related to a conceivable public purpose (*Vitucci v New York City School Constr. Auth.*, 289 AD2d 479, 431; *Fisher v Urban Development Corp*, 287 AD2d 262, 263; *Greenwich Associates v Metropolitan Transportation Auth*, 152 AD2d 216, 219, *appeal dismissed* 75 NY2d

865). The scope of our review is necessarily narrow since this exercise of the eminent domain power is a legislative function (*Kaskel v Impellitteri*, 306 NY 73, 80, *cert denied* 347 US 934; *New York City Housing Auth v Muller*, 270 NY 333, 339). A separate constraint is a consequence of our review of a determination made after a hearing. The ESDC "public purpose" determination must be affirmed if there exists "substantial evidence" in the hearing record (*Jennings v New York State Office of Mental Health*, 90 NY2d 227, 239). Petitioners could only prevail in this proceeding if they demonstrated that the determination is not rationally related to a conceivable public purpose (*Waldo's Inc. v Village of Johnson City*, 74 NY2d 718, 720; *Jackson v New York State Urban Development Corp*, 67 NY2d 400, 420-21; *East Thirteenth Street Community Assn v New York State Urban Development Corp*, 189 AD2d 352, 359, *affd* 84 NY2d 287).

Petitioners have not sustained their burden of showing that the challenged determination is without foundation (*see, Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, *ly denied* 54 NY2d 809). The record shows that "the exercise of the eminent domain power is rationally related to a conceivable public purpose" (*see, Hawaii Housing Auth v Midkiff*, 467 US 229, 241), that purpose being the further reduction of the blight that has long pervaded the subject area (*see, Rosenthal & Rosenthal v New York State Urban Development Corp*, 771 F2d 44, 46, *cert denied* 475 US 1018). Given the breadth with which public use is defined in the condemnation context (*see, Matter of Fisher v Urban Development Corp*, 287 AD2d 262, 263), we find that a public purpose is dominant, warranting confirmation of the challenged determination, even though a private entity will benefit substantially

from its involvement in the project (*see*, *Matter of Waldo's, Inc v Village of Johnson City*, 74 NY2d 718, 721). We are unpersuaded by petitioners' unsubstantiated assertion that the goals of the urban renewal plan have been achieved (*see*, *Jo & Wo Realty Corp v City of New York*, 157 AD2d 205, 218, *affd* 76 NY2d 962). Virtually all of the anticipated outcomes of this project clearly serve a public purpose by eliminating a pernicious blight which has impaired the economic development of a midtown Manhattan neighborhood. That a private business may obtain substantial benefits does not call into question the use of eminent domain and, under the circumstances, a statutory purpose of the UDC has been furthered. Petitioners' claim that restrictions placed by respondent UDC upon their use of the subject property have amounted to takings without due process is without merit, since respondents have not deprived any petitioner of the use and enjoyment of its land for a period of indefinite duration (*cf.*, *Jensen v City of New York*, 42 NY2d 1079, 1080-1081). The record is devoid of evidence which would support petitioners' conclusory allegations that the long-standing prospect of condemnation barred them from ameliorating or eliminating the persistent urban blight in the project area. We have considered petitioners' remaining arguments in opposition to the challenged determination and find them unavailing.

Accordingly, the determination and findings of respondent New York State Urban Development Corporation, issued on or about November 30, 2001, which directed that respondent Empire State Development Corporation exercise its power of condemnation in order to acquire, as necessary, real property designated Site 8 South within the 42nd Street Project, should be confirmed, the applications brought pursuant to Eminent Domain

Procedure Law § 207 denied and the petitions dismissed, without costs or disbursements.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 20, 2002

/s/ Catherine O'Hagau Wolfe
CLERK

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED EMINENT DOMAIN PROCEDURE LAW CHAPTER 73 OF THE CONSOLIDATED LAWS ARTICLE 2 – DETERMINATION OF THE NEED AND LOCATION OF A PUBLIC PROJECT PRIOR TO ACQUISITION

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Current through L. 2002, chs. 1 and 5 to 654.

§ 207. Judicial review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to section two hundred four of this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with that first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and

(4) a public use, benefit or purpose will be served by the proposed acquisition.

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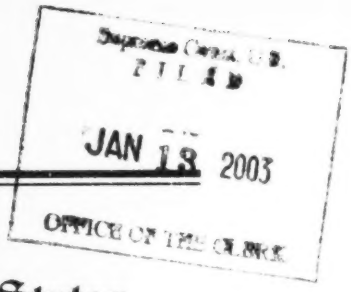
Nos. 02-909, 02-910



IN THE

Supreme Court of the United States

THREE O REALTY LLC,

Petitioner,

- and -

WEST 41st STREET REALTY LLC, *et al.*,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION and 42nd ST. DEVELOPMENT PROJECT, INC.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

JOSEPH M. RYAN*
JOHN R. CASOLARO
SUSAN B. KALIB
CARTER LEDYARD & MILBURN LLP
2 Wall Street
New York, New York 10005
(212) 732-3200

Attorneys for Respondents

* *Counsel of Record*

Questions Presented

1. Given a record replete with support for the condemning agency's findings of blight, is the constitutionality of the taking undermined by Petitioners' self-serving and unsupported allegations that the blight findings are "pretextual"?

2. Should the condemning agency be barred from implementing a project to cure blight merely because the project is one of the later stages of a highly-successful multi-phased plan?

Statement Pursuant To Supreme Court Rule 29.6

Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") is a political subdivision of the State of New York constituting a public benefit corporation. 42nd St. Development Project, Inc. is a wholly-owned subsidiary of ESDC.

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Nos. 02-909, 02-910

IN THE

Supreme Court of the United States

THREE O REALTY LLC,

Petitioner,

- and -

WEST 41st STREET REALTY LLC, *et al.*,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION and 42nd ST. DEVELOPMENT PROJECT, INC.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *The 42nd St. Project*

The 42nd Street Development Land Use Improvement Project (the "42nd St. Project") involves the revitalization of approximately 13 acres of land in the Times Square area of

midtown Manhattan. (R 381).[1] The 42nd St. Project was developed in response to rampant crime, substandard and insanitary conditions, undesirable uses and physical and social blight in the area. (R 86). The New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and 42nd St. Development Project, Inc. ("42DP") have carried out the 42nd St. Project in phases, beginning in 1990. (R 381, 384). Each of the earlier stages of the 42nd St. Project successfully reduced blight in the areas affected. (R 382-85, 399-400).

The current phase of the 42nd St. Project involves development of a long-blighted area known as Site 8 South (the "Project").[2] The Project calls for the use of ESDC's eminent domain power to acquire blighted, obsolete and underutilized buildings and surface parking lots from 11 different property owners, four of whom are the Petitioners. The Project will reinforce, improve and continue the metamorphosis of the 42nd St. Project area by further eliminating blighted conditions and the resultant drain on municipal resources, enhancing tax revenues, and further stabilizing the Times Square area. (R 373-74, 417).

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[1] "R" citations are to the printed record in the Supreme Court of the State of New York, Appellate Division, First Department. The 42nd St. Project extends from 7th to 8th Avenues between 40th and 43rd Streets.

[2] Site 8 South is across the street from the Port Authority Bus Terminal on Eighth Avenue between 40th and 41st Streets, extending approximately half a block east toward Seventh Avenue.

ESDC underscored the vital need to develop Site 8 South in its November 2001 Determination and Findings:

> The blight in the area takes various forms: socially in disproportionate crime statistics and a tarnished City image, particularly for visitors entering the City at the Port Authority Bus Terminal; physically, in obsolete buildings and underutilized parcels; and economically, in disproportionate drains on municipal services and underutilized tax and employment potential. Eradication of these continuing substandard and blighted conditions will yield benefits for the Project area, the 42nd Street Project area, and the City. (R 373).

The proposed development will provide economic, social and physical benefits to the City and State of New York, and will transform a blighted, deteriorated, substandard, insanitary and underutilized site to full productive use. (R 373-74, 402, 417, 419-21, 640-41, 644). The Project will reduce crime, increase employment, boost tax revenue, and create much needed class A office space in the area. (R 373, 630-35, 641).

As the new headquarters for The New York Times, with an additional 700,000 square feet of office space, retail uses at grade, and an auditorium available for public use, the completed development will be active and alive 24 hours a day. Retail uses will enliven the side streets into the evening hours, attract passers-by, and discourage the current loitering and other anti-social behavior. (R 421). The tower itself, with its glass facade, will provide a dramatic icon for the City's skyline and a visual anchor for the area. (R 425-27).

B. *ESDC's Authority To Acquire The Property*

In 1968, the New York State legislature created ESDC and empowered it to acquire property in any lawful manner, pursuant to the provisions of the Eminent Domain Procedure Law ("EDPL"). New York Urban Development Corporation Act §§ 4 and 13, N.Y. Unconsol. Laws §§ 6254 and 6263. In the case of land use improvement projects, ESDC is required to make findings that the project area "is a substandard or unsanitary area, or is in danger of becoming a substandard or unsanitary area and tends to impair or arrest the sound growth and development of the municipality" and that "the plan or undertaking affords maximum participation by private enterprise, consistent with the sound needs of the municipality as a whole." N.Y. Unconsol. Laws § 6260(c).

ESDC made and updated detailed findings of substandard conditions both in its Basis for Blight Findings and the addenda thereto (R 508-45) and in its Environmental Review Technical Assessment (R 397-428). ESDC also concluded that the Project will allow maximum participation by private enterprise to provide what the City greatly needs – employment opportunities, enhanced tax revenue, and a renewed showing of dedication from the business community to the City. (R 373, 630-35, 641).

C. *The Decisions Below*

In December 2001, Petitioners[3] challenged the Project by initiating an original proceeding in the Supreme Court of

[3] This brief is submitted in opposition to the petitions for writs of certiorari of (1) Three O Realty, LLC (no. 02-909) and (2) West 41st Street Realty LLC, EMM Realty Corp., and Times Square Garage, Ltd. (02-910). Both petitions were filed against respondents New York State Urban Development Corporation d/b/a Empire State (Cont'd)

the State of New York, Appellate Division, First Department. (R 65-85). Petitioners set forth two claims in their petition. First, they argued that the Project served a private rather than a public purpose. This claim was supported only by Petitioners' own inflammatory assertions that the stated public purpose is pretextual. Second, Petitioners asserted, again without the slightest support, other than their own unsubstantiated assertions, that the proposed taking is unconstitutional because Respondents refused to permit Petitioners to develop their properties. (West 41st St. Pet. App. C (12a)).

On June 20, 2002, the Appellate Division unanimously dismissed Petitioners' challenges to ESDC's determination and findings. The Appellate Division decided the case by rejecting the factual foundations of the Petitioners' arguments. The Appellate Division found as a factual matter that "[t]he record shows that 'the exercise of the eminent domain power is rationally related to a conceivable public purpose,' that purpose being the further reduction of the blight that has long pervaded the subject area." (West 41st St. Pet. App. 10a) (citations omitted). The Appellate Division specifically noted that "[a]n active drug trade persists" at the site (*Id.* at 10a). The Appellate Division also found as a factual matter that "the record is devoid of evidence which

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(Cont'd)

Development Corporation and 42nd St. Development Project, Inc. Because both petitions object to the same urban redevelopment project and present similar factual and legal arguments, Respondents are submitting this single response to these petitions for the Court's convenience.

"Three O" citations refer to the first petition (02-909) and "West 41st St." citations refer to the second petition (02-910).

would support Petitioners' conclusory allegations that the long-standing prospect of condemnation barred them from ameliorating or eliminating the persistent blight in the project area." (West 41st St. Pet. App. 10a-11a).

On June 26, 2002, the Petitioners purported to appeal as of right to the New York Court of Appeals. On September 12, 2002, the Court of Appeals dismissed Petitioners' appeals, stating that "no substantial constitutional question is directly involved." (West 41st St. Pet. App. A (1a-2a)). No discretionary appeal was ever sought by the Petitioners to the Court of Appeals.

Pursuant to a condemnation proceeding in the Supreme Court, State of New York, title to all the properties in Site 8 South was transferred to ESDC on August 19, 2002. Due to ESDC's relocation efforts, the site is already half vacant. For example, more than 120 tenants from one building have moved and received relocation payments, and the owner of that building accepted a multi-million dollar settlement for its property.

At no time during the relocation process have Petitioners attempted to seek relief from any other court. Even after the New York Court of Appeals dismissed their appeals, Petitioners waited nearly 90 days before filing their petitions for writs of certiorari.

ARGUMENT

SUMMARY OF ARGUMENT

Petitioners allege – without any evidentiary support in the record – that the stated public purpose of the Project is pretextual and that they could have developed the site themselves. On the basis of their unsupported assertions, Petitioners are asking this Court to question well-established precedent, which has consistently afforded great deference to legislative judgments.

Given a record replete with support for ESDC's blight findings and public purpose determination, this case does not raise any constitutional issue. The fact that this Project will incidentally benefit private entities does not undermine the constitutionality of the taking.

There is no evidence in the record that Petitioners ever tried to develop Site 8 South on a private basis or that they even had the ability to do so, since they do not control the entire site. Their property is not permanently insulated from condemnation merely because this Project is the latest phase in a highly-successful multi-phased urban redevelopment project.

POINT I

THE DECISION BELOW IS FULLY CONSISTENT WITH WELL-ESTABLISHED CONSTITUTIONAL LAW AND PRECEDENT

A. *In Reviewing Condemnation Decisions, This Court Has Always Afforded Great Deference To Legislative And State Court Decisions*

It has long been recognized that the power of eminent domain, one of the most ancient and significant sovereign prerogatives, grants government and its authorized agents considerable latitude and discretion to take privately owned property, without the owner's consent, for a public use. *See generally* 26 *Am. Jur. 2d Eminent Domain* §§ 1-3. This Court has never held a compensated taking to be unconstitutional.

Judicial review of a condemnation decision is narrowly circumscribed. *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954). This Court has long held that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329 (1984) (*quoting United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

The Court has made clear that:

> when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served

> by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. *Berman*, 348 U.S. at 33, 75 S. Ct. at 102.

Courts may reject a legislative decision to condemn property only if the decision was not "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329 (1984). Judicial "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'" *Midkiff*, 467 U.S. at 240, 104 S. Ct. at 2329 (*quoting Berman*, 348 U.S. at 32, 75 S. Ct. at 102 and *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

In *Berman*, the Court defined "[t]he concept of public welfare [as] broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." 348 U.S. at 33, 75 S. Ct. at 102-03. It may include beautification and the creation of a healthy, spacious, clean, well-balanced and carefully patrolled area. *Berman*, 348 U.S. at 33, 75 S. Ct. at 102-03. The determination of what constitutes a public use "is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State." *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705-06 (1923).

B. *The Administrative Record Amply Supports The Condemning Agency's Blight Findings*

The record in this proceeding is replete with findings — and support for the findings — that Site 8 South is marked by substandard and blighted social, physical, and economic

conditions, and that the acquisition and subsequent development of Site 8 South will serve the public interest. The record substantiates the blighted conditions plaguing Site 8 South including, *inter alia*, prostitution, drug use, underutilization, a disproportionate amount of crime and resulting drains on municipal resources and underutilized tax and employment potential. (R 373). Economically, Site 8 South now provides only a fraction of its tax and employment capability.

ESDC's Basis for Blight Finding and the addenda thereto detail the conditions on Site 8 South from 1981 through 2001. (R 508-545). These findings show that blight at Site 8 South pre-dated the 42nd St. Project, that blight continues, and that, without public intervention, there is no reason to believe blight will cease to exist. Despite Petitioners' assertions that blight in Site 8 South was exclusively a problem of the past, ESDC's most recent Basis for Blight Finding (Third Addendum, August 2001) outlines the existing blight in Site 8 South:

* Site 8 South is "developed only to a fraction of [its] theoretical capacity." It is occupied by two large undeveloped parking lots, a parking garage, and several relatively small, low-rise buildings;

* The buildings in Site 8 South generally present a shabby gateway to the Times Square area, particularly for workers, visitors, and tourists arriving in Manhattan via the Port Authority Bus Terminal across Eighth Avenue;

* Prostitution, drug use, and loitering are still common along Eighth Avenue in the vicinity of Site 8 South, particularly around the many sex-related businesses that remain in retail storefronts; and

> * These unseemly uses and the resulting lack of most desirous amenities have the secondary effect of discouraging pedestrians from lingering in the area, which has retarded the area's revitalization and adversely affected nearby areas.

(R 544-45).

The 2001 Environmental Review Technical Assessment, performed for ESDC by an independent environmental consultant, spells out how Site 8 South is both underused and underdeveloped:

> [A]ll of the Site 8 S stores are inconsistent with the overall Project's scale, intended uses and atmosphere. Lots 14 and 53 [the surface parking lots] are undeveloped, and at Lot 15, the upper floors are sealed off entirely. None of the existing uses support the Project goals. . . . such as restoring the Project area's role as a positive influence on the adjacent communities, and increasing the Project area's economic contribution to the City as a whole.

(R 419). The 2001 Environmental Review Technical Assessment elaborates on the problems surrounding the sex-oriented businesses in Site 8 South:

> Approximately five adult entertainment uses operate at Site 8 S. . . . Such businesses continue to maintain exclusively sex-related merchandise and, accordingly, continue to create the secondary effects of blight, increased loitering, and crime.

> Site 8 S is the only remaining 42nd Street Development Project site that still retains several adult-related businesses. . . . As a whole, these adult related uses continue to contribute to blighting elements on Site 8 S and within the surrounding neighborhood.

(R 420). The 2001 Environmental Review Technical Assessment also addresses the loitering and lack of street traffic on portions of the Site:

> Portions of Site 8 S continue to attract loitering and other undesired street presence. Tourists and commuters hurry in and out of the area, discouraged by the poor street-level conditions and the lack of positive amenities. Most of the retail establishments close early; for most pedestrians, this absence of positive street activity is highlighted at night by the presence of a bar and sex-related establishments.

(R 420-21). The 2001 Environmental Review Technical Assessment further cautions that these unfavorable conditions will persist in the absence of development on Site 8 South:

> With the exception of Site 8 S and Site 8 N, the blighted conditions within the [Times Square] area are expected to disappear. In 2005, existing uses on Site 8 S and Site 8 N otherwise would remain inconsistent with both the Project and surrounding areas, and would continue to discourage pedestrian activity along the eastern side of Eighth Avenue south of 42nd Street.

(R 421).

The testimony of various community leaders at the September 2001 public hearing on the proposed condemnation of Site 8 South provides direct support for these conclusions. Many individuals described in detail the physical blight, decay, economic underdevelopment, and unseemly business and pedestrian activity that marks Site 8 South. The excerpts that follow from the transcript of the hearing reflect the consistent agreement on the many ways that the public will benefit from the proposed development on Site 8 South.

Bill Daly, the director of public services for the Fashion Center Business Improvement District, described the present conditions of blight in Site 8 South:

> The particular site we are addressing at this public hearing now contains small storefronts that are clustered among five adult entertainment establishments that exist side by side and create the atmosphere of a mini red light district.
>
> Such a concentration of sex businesses, combined with the low-end retail and food establishments, provides an enclave for criminals to loiter and drug dealers to ply their trade on the sidewalk.
>
> It is time to finally put an end to these conditions, and doing so will encourage the rebirth of this part of Eighth Avenue in the West Thirties.

(R 667-68).

Virginia Sullivan, the acting director of the Office of Midtown Enforcement of the Office of the Mayor, echoed those observations:

> The Mayor's Office of Midtown Enforcement fully supports the proposed project to further improve conditions in this area because our tools alone are not sufficient.
>
> City inspectors from the Buildings, Fire and Health Departments assigned to our Office continually issue code violations to the businesses in this area as well as along Eighth Avenue.
>
> Just this past May our Office brought a nuisance abatement action against a premise within the proposed site, 636 Eighth Avenue, used for the fencing of stolen goods and for the sales of drug paraphernalia.
>
> The proposed site also houses mostly adult use establishments, such as adult video stores and peep shows that are not covered by the current Adult Use Laws since they do not fall within the required distance of any sensitive receptor. . . .
>
> These establishments located in the site area attract a less than savory element who linger in front of the establishment morning and night and contribute to the general feeling of unsafety.

(R 669-70).

These statements, and others like them (R 629-32), support ESDC's conclusion that Site 8 South is blighted and that the proposed development will substantially benefit the surrounding area and the City as a whole.

POINT II

THERE IS NO EVIDENCE THAT THE STATED PURPOSE OF THE PROJECT IS PRETEXTUAL

Petitioners argue that "the taking is unconstitutional because it is being carried out for the private purpose of substituting one private developer for another, not for the purported public purpose of eliminating blight." (West 41st. St. Pet., p. 13; Three O Pet., pp. 25-26). That this Project benefits private entities does not negate or even call into question the valid public purpose of the Project. Under ESDC's enabling legislation, ESDC is required to "afford maximum opportunity for participation by private enterprise . . ." N.Y. Unconsol. Laws § 6260(c). The fact that the Project may advance incidental private interests of the New York Times Company and the developer of additional office space is not unlawful and does not detract from its public purpose. *See Murray v. La Guardia*, 291 N.Y. 320, 329-30 (1943), ("[I]f, upon completion of the project the public good is enhanced it does not matter that private interests may be benefited."), *cert. denied*, 321 U.S. 771 (1944); *Hughes v. Consol-Pennsylvania Co.*, 945 F.2d 594, 613 (3d Cir. 1991); *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 242 (5th Cir. 1967) (*citing Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co.*, 243 U.S. 563, 37 S. Ct. 440 (1917)); *Washington-Summers, Inc. v. City of Charleston*, 430 F. Supp. 1013, 1015 (S.D. W. Va. 1977) (*citing Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62, 17 S. Ct. 56 (1896)).

For Petitioners to allege instead that the stated purpose is "pretextual" would require specific proof that the stated purposes are a sham and a fraud. *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 618 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S. Ct. 1204. (1986). In *Rosenthal & Rosenthal, Inc.*, the Court considered an earlier challenge to the 42nd St. Project and found that "it would be quite reasonable for the project planners to conclude that this kind of large scale redevelopment, bringing thousands of new people into the neighborhood and radically changing the physical configuration of the area, would further the Project's overall goals of eliminating blight and revitalizing Times Square." 605 F. Supp. at 619.

There is no direct evidence nor can any inference reasonably be drawn that the stated purpose of the Project is pretextual. Petitioners argue this point by stating they could have eliminated existing blight themselves if they had been "permitted" to develop the property. (West 41st St. Pet., pp. 6-7, 14). Yet Petitioners cite no instances of their trying to develop the properties or any denial or interference with any application for a construction permit, zoning variance or financing. Nor do they cite to any regulatory action by Respondents, or any other authority, that interfered with Petitioners' right or ability to develop their property. In fact, Respondents in no way interfered with the financing or development of the Site and, in fact, have no authority to grant or deny building permits or zoning changes.

While Petitioners contend that they could have removed the blight themselves, this claim is entirely unsupported in the record. In fact, the diversity of land ownership on Site 8 South (ten relatively small separately-owned parcels) has prevented private sector assemblage. A lower court drew this conclusion as a factual matter during the valuation proceeding of another

site in the 42nd St. Project. *See Matter of New York State Urban Dev. Corp. (Hotel Strand)*, Index No. 44607/91 at 7 (Sup. Ct. N.Y. Co. Aug. 18, 1997) ("Nor was there any indication that without condemnation [claimant's alleged potential] assemblage would have been undertaken privately and a market for claimants' parcel (or air rights) created thereby 'within a reasonably close future.'").[4]

Numerous sites in Manhattan have not been developed for decades because of such fragmented ownership, most important for present purposes, West 42nd Street before the earlier stages of the 42nd St. Project. *Rosenthal & Rosenthal*, 605 F. Supp. at 618:

> Nothing in the Constitution prevents a state from deciding that in a particular area diversity of land ownership stands in the way of full economic development, and that assembling a major site to be developed as a piece is the best way to serve the public purposes of eliminating blight, creating jobs, and broadening the tax base.

Petitioners' claim that existing blight will disappear in the absence of condemnation is wholly speculative and belied by decades of inaction at Site 8 South and neighboring properties. This claim is also belied by the record before this Court. Site 8 South was blighted long before the inception of the 42nd St. Project; it was blighted when Respondents issued the Determination and Findings challenged in this proceeding; it remains blighted.

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[4] Pursuant to Supreme Court Rule 15.3 and 24.1(j)(3), a copy of *Matter of New York State Urban Dev. Corp. (Hotel Strand)*, Index No. 44607/91 at 9a (Sup. Ct. N.Y. Co. Aug. 18, 1997) is reproduced in resp. app. (1a-13a).

The existence of a valid public purpose in eliminating blight in the Times Square area has already been determined. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986). Petitioners concede the removal of blight is a valid public purpose (Three O Pet., p. 6). Respondents are in a position to remove the blight effectively and efficiently. This conclusion is firmly supported in the record and it is precisely what ESDC was created to do and has done successfully in the 42nd Street Project to date.

By arguing that ESDC should have chosen one of the Petitioners to develop Site 8 South, Petitioners are, in effect, arguing that ESDC did not choose the best, most efficient or most desirable way to go about removing blight at Site 8 South. The necessity and expediency of a taking, however, is not a question for the courts:

> That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. *Adirondack Railway v. New York City*, *supra*, 176 U. S. at 349, 20 Sup. Ct. 460; *Shoemaker v. United States*, 147 U.S. 282, 298, 13 Sup. Ct. 361; *United States v. Gettysburg Electric Railway*, 160 U.S. 668, 685, 16 Sup. Ct. 427; *Boom Company v. Patterson*, 98 U.S. 403, 406. Neither is it any longer open to question in this court that the Legislature may confer upon a municipality the authority to determine such necessity for itself. *Bragg v. Weaver*, *supra*, 251 U. S. at 58, 40 Sup. Ct. 62; *Sears v. City of Akron*, 246 U.S. 242, 251, 38 Sup. Ct. 245. The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 678, 43 S. Ct. 684, 689 (1923).

Petitioners also argue that this taking is unnecessary because their own properties are not blighted. (Three O Petition, p. 20). As the excerpts from the record cited above demonstrate, Site 8 South is entirely blighted. Two of the Petitioners herein own the two wholly underutilized surface parking lots on the site. Even if isolated pockets of the site were found not to be blighted, however, the relevant inquiry focuses on the condition of the site as a whole. *Rosenthal & Rosenthal*, 605 F. Supp. at 615-16, 617; 771 F.2d at 46. This Court has long held that a condemning agency may take for a public use property "which, standing by itself, is innocuous and unoffending." *Berman*, 348 U.S. at 35, 75 S. Ct. at 104. The Court reasoned as follows:

> If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . [C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis — lot by lot, building by building. It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. . . . It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

Berman, 348 U.S. at 35-6, 75 S. Ct. at 104 (citations omitted).

POINT III

RESPONDENTS ARE NOT BARRED FROM IMPLEMENTING A PROJECT TO CURE BLIGHT MERELY BECAUSE THE PROJECT IS ONE OF THE LATER STAGES OF A MULTI-PHASED PLAN

Petitioners argue that inclusion of their property as part of the 42nd St. Project prevented them from developing their property in violation of their due process rights. (West 41st St. Pet., pp. 16-19). They claim that because it was well-known that their property was part of the 42nd St. Project and might one day be condemned, they were unable to obtain financing or long-term-tenant commitments. Petitioners then claim that as a result of this alleged deprivation, their property is now insulated from condemnation entirely. Petitioners' claims are unsupported in the record as a factual matter; they are unsupported by the cases they cite; and they are barred by established precedent.

Confronted with pervasive and persistent blight in older urban and commercial areas throughout this State, the New York State Legislature recognized the need for a sustained effort by the public sector in conjunction with the private sector to remedy these conditions. That Respondents have already made substantial progress in the area does not mean that they cannot carry out the remaining phases of the 42nd Street Project.

Petitioners do not and cannot argue that their ability to develop their property was directly prevented by some action of ESDC, such as refusal to issue a building permit or passing of restrictive zoning rules. In *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241 (1971), the New York Court of Appeals

addressed the *de facto* taking concept implicitly raised by Petitioners:

> [T]he concept of *de facto* taking has traditionally been limited to situations involving a direct invasion of the property or a direct legal restraint on its use . . . and to hold that there can be a de facto taking appropriation absent a physical invasion or direct legal restraint would, needless to say, be to do violence to a workable rule of law.

In *City of Buffalo*, the city told the property owner of its intent to condemn, led him to move his printing business, and then delayed several years before deciding to condemn his property. The Court of Appeals held:

> The facts herein fail to disclose any act upon the part of the condemning authority which could possibly be construed as an assertion of dominion or control . . . We simply have a manifestation of an intent to condemn and such, even considering the protracted delay attending final appropriation, cannot cast the municipality in liability upon the theory of a 'taking' for there was no appropriation of the property in its accepted legal sense.

City of Buffalo, 28 N.Y.2d at 255.

The record is devoid of any facts that Respondents have in any way restricted Petitioners' rights to develop their property. At best, Petitioners are claiming that their right to develop their property was impaired as a result of public discussion and plans to redevelop through condemnation,

if necessary. The planning and attendant publicity, controversy, litigation and delay with respect to multi-billion dollar remedial projects do not, however, rise to the level of a *de facto* or regulatory taking of property.

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as 'a taking' in the constitutional sense.

City of Buffalo, 28 N.Y.2d at 255 (*quoting Danforth v. United States*, 308 U.S. 271, 285, 60 S. Ct. 231, 237 (1939)). If Respondents were responsible for affirmative, value-depressing acts that resulted in diminished property value, Petitioners could seek damages under a theory of condemnation blight. *Niagara Frontier Building Corp. v. State of New York*, 33 A.D.2d 130, 133 (4th Dep't 1969), *aff'd*, 28 N.Y.2d 755 (1971); *City of Buffalo*, 28 N.Y.2d at 257-58. Petitioners' resulting award would "be based on the value of the property as it would have been at the time of the *de jure* taking, but for the debilitating threat of condemnation." 28 N.Y.2d at 258. Petitioners allege no such acts because none occurred. Even if they had occurred, the remedy is damages in the condemnation proceeding not an injunction against taking the property.

Petitioners also argue that Respondents actively prevented development of Site 8 South by "litigat[ing] state-law statutory issues all the way to the New York Court of Appeals" and by "rebuff[ing] a formal offer by the landowners of Site 8 South to develop the Site." (West 41st St. Pet., p. 17). In fact, it was two of the Petitioners herein

who filed an action seeking declaratory relief that acquisition of their property was time-barred. Petitioners lost that action and unsuccessfully appealed to the New York Court of Appeals. *250 West 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, 277 A.D.2d 47 (1st Dep't 2000), *leave to appeal denied*, 96 N.Y.2d 705 (2001). The Court of Appeals denied the requested declaratory relief.

While that action was pending, ESDC and 42DP representatives met with more than a dozen developers, including a principal of one of the Petitioners concerning possible development of Site 8 South. (R 182). The principal of Petitioner West 41st St., which only took title to property at the Site in 2001, submitted a letter to Respondents in 1999, stating that the plaintiffs who brought the state court action seeking a declaratory judgment (referenced in the preceding paragraph) would discontinue that action with prejudice if West 41st St. were designated the sole developer of Site 8 South. (*Id.*) In fact, West 41st St. explained in the letter that the plaintiffs in that action (two of the Petitioners herein) were *contractually obligated to agree to condemnation* if he became the sole developer of the Site. (*Id.*). Thus, the Project would have proceeded unchallenged by several of the Petitioners if ESDC had simply chosen the now disappointed West 41st St. as developer, even though the public-private partnership would create the same public use issues alleged here.

The large size of Site 8 South mandated, and 42DP actively searched for, a creditworthy developer with the strong prospect of a major tenant in the private market. West 41st St. did not present a specific proposal, did not demonstrate to 42DP that it had financing in place, and did not have a long-term commitment from a major tenant.

POINT IV

THERE IS NO CONFLICT AMONG LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW AND CERTIORARI SHOULD BE DENIED

One of the Petitioners argues that "[t]here is a split in the Circuits and the State Courts on whether pretextual blight findings may satisfy the Takings Clause's 'public use' requirement." (Three O Pet., p. 21). The other Petitioners argue that there is a conflict among courts as to whether it is constitutionally permissible to take private property from one owner *in order* to give it to another landowner for its private purposes. (West 41st St. Pet., pp. 14-15). Both these arguments are preposterous. No case has ever held that a pretextual blight finding is sufficient to satisfy the Constitutional public use requirement. Nor has any case in modern jurisprudence ever held that the state may take private property for the purely private *purpose* of giving it to another landowner.

A close review of the cases cited by Petitioners indicates that other courts reviewing condemnation decisions routinely apply the same principles of condemnation law as the court did below. The only material differences between the cases cited by Petitioners and this case are the facts and outcomes of the respective cases. That different facts produce different outcomes hardly suggests a conflict. The purported conflict simply does not exist and review by this Court is unnecessary.

Dated: New York, New York
January 13, 2003

Respectfully submitted,

JOSEPH M. RYAN*
JOHN R. CASOLARO
SUSAN B. KALIB
CARTER LEDYARD & MILBURN LLP
2 Wall Street
New York, New York 10005
(212) 732-3200

Attorneys for Respondents

* *Counsel of Record*

APPENDIX

APPENDIX — MATTER OF NEW YORK STATE URBAN DEVELOPMENT CORPORATION (*Hotel Strand*)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 24

In the Matter of the Application of the New York State Urban Development Corporation to acquire title in fee to certain real property necessary for a land use improvement project known as

42ND STREET DEVELOPMENT PROJECT

Index No. 44607/91

Claimant: 206 WEST 43RD STREET HOTEL CORP
(HOTEL STRAND)
Block 1014, Lot 37
206-208 West 43rd Street
New York, New York

PARNESS, J.:

This is a proceeding under Article 7 of the EDL to determine the compensation to be paid claimant in this condemnation proceeding. Vesting date was April 18, 1990. The subject premises was taken as part of the 42nd Street Time Square Redevelopment Project (Project). It contains a 12 story and basement hotel with two street level store spaces sited on a 30' x 100' lot and is located on the south side of 43rd Street some 100 feet west of Seventh Avenue in the Times Square area of Manhattan (206-208 West 43rd Street). The property was assessed at $1,260,000 (transitional $1,072,000).

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The hotel has a total of 107 rooms, 45 with private bath and 62 without. At vesting it was closed, by court order, because of pervasive drug activity. When operating it appeared to be more of a SRO rooming house rather than a hotel providing, basically, shelter at modest prices with minimum tradition hotel services. The posted "day rates" can best describe this type of hotel and some of its daily clientele. Built in 1905, the building had been permitted to deteriorate both physically and in the manner of its operation.

Essentially claimant's appraiser, Albert, opined highest and best use to be demolition of the existing structure and utilization of the lot for high rise development either by itself or in conjunction with adjoining properties made similarly available for development (Tr 2667, 2677). Through his analysis of comparable sales of properties purchased for development, at or near the Times Square area, he found a development land value for the subject parcel of $100 per square foot (S/F) when a 1987 valuation date is used, and $110 S/F for the vesting date in 1990.

Albert's referencing of 1987 for a valuation rate is grounded in his opinion that absent the "threat of condemnation" — which he contends began late in 1970's or early 1980's when word of the proposed project became public — the property would have been developed as were others in the mid Manhattan area during the heightened building period of the 1980's. As examples, he cites certain hotel and other commercial construction which took place at that time just north of the subject parcel. Such development was spurred on in part by zoning changes which, under certain conditions, granted an increase in the permitted

floor area ratio (FAR) from 15 to 18, resulting in increases in buildable areas permitted on a site. Albert therefore, in determining his land value, selects 1987 valuation date so as to obtain the benefit of this potential enhanced FAR. However, he also submits an alternate appraisal at the FAR 15 in affect on the date of vesting.

As another valuation approach, Albert hypothesized retention of the existing operating hotel for which he obtains a value based upon analysis of comparable sales of hotels and in his rebuttal appraisal, through income capitalization. He then opined an additional value based upon presumed sale of the property's air rights to a developer of a neighboring site. This is predicated again upon his assumption that private development would have occurred in the block in which the subject property is located absent the project.

His damage values, whether he opines sale and demolition of existing structure, or in the alternative, retention of the hotel and sale of air rights, of course, differ depending on whether an FAR 15 or 18 is applied to his lot square footage.

An FAR of 18 (his valuation date 4/18/87) produces for this expert a vacant lot value, after deducting the cost of demolition, of $4,800,000.00 while for a FAR of 15 he finds a vacant lot value of $4,370,000.00.

As stated, under his alternate valuation approach, he retains and obtains a value for the existing structure with an additional value based upon a sale of unused air rights to hypothesized adjacent development site. From his analysis of comparable hotel sales he finds a value for the subject

premises of $80 per S/F of gross building area which when applied to the existing hotel's 28,315 S/F results in a hotel building value of $2,265,000.00. To this he adds an additional $1,100,000.00 for saleable unused air rights (16,880 S/F at $90 a S/F) to yield a total damage value of $3,365,000.00.

Condemnor's expert, Haims, found present use as highest and best. He obtained value through income capitalization. From what he determined to be the hotel's actual gross income from room rentals, he obtained a fall-out room rate of $30 a day. This $30 daily rate when annualized (365 days) and applied to the 107 rooms and then subjected to a vacancy rate of 50% which Haims opines for this hotel, results in a gross room rental income of $600,000 (30/day x 365 days x 107 rooms x 50% vacancy). To this he added $55,500 as potential street level store rental income (10,000 S/F at $55 S/F) and $10,000 for potential signage income. The result is an effective gross rental income of $668,150 (after a 5% [$2,750] allowance for vacancy and collection loss against non-payment-hotel income). From this gross he deducts stabilized expenses of $434.00 (see Haims' appraisal P. 60) obtained through his analysis of comparable hotel expenses yielding a net operating (NOI) income of $235,000 before real estate taxes. He then deducted real estate taxes in the sum of $45,854. He anticipates an increase of $9,929 over the property's present taxes of $35,924 as a result of the values found for this property (P. 61 of his appraisal). After deducting taxes, he subjected the resulting NOI of $189,146 to a capitalization rate of 11.6% which yielded his value for this property of $1,600,000.

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Essentially, the great disparity in value conclusions is due to the experts differing opinions as to the properties "highest and best use"; i.e. Haims adopting present use and Albert a future one. Highest and best use determines value and compensation to be paid whether or not it is the present or existing use (Matter of the City of New York [Dexter Motors Inc.], 21 A.D.2d, 652, aff'd, 16 New York 2d 814).

Albert contends that, but for the threat of the instant condemnation from the late 1970's onward, the subject parcel's, highest and best use was as part of a development site and absent the project it would have been marketable during that period at appropriate development land values. Haims disputes this, opining that the development in the immediate block in which the subject property was located was precluded by various socio-economic factors, such as crime, a large homeless population, land marking of adjoining theatres, and cost of assemblage.

While it is always difficult to speculate as to what would probably have happened with the subject property had not the project taken place, certain factors are particularly relevant as to such probability. What certainly is relevant is the social and economic conditions of this portion of Times Square which conditions pre-existed the project, particularly as to their impact upon redevelopment.

The 42nd Street Development Project had as its principal purpose the elimination of blighted conditions in certain portions of the Times Square/42nd Street area, and replacement with attractive and economically productive uses. The project area focused on two blocks facing 42nd Street from 7th to

8th Avenus. Included also are certain properties facing the Port Authority Bus Terminal and others in the Times Tower block, the "crossroads" block bounded by 7th Avenue, Broadway 41st and 42nd Streets as well as a portion of the block between 42nd and 43rd Streets east of Broadway.

The original development of Times Square as a central commercial and entertainment area can be traced to the early 1900's when it became a transportation hub due in no small part to the new subway system. During these early periods some of the famous commercial buildings such as the Times Tower and Astor and Knickerbocker hotels were opened. With legitimate theatre development, the area in the early period became famous as the "Great White Way". However, by the late 1920's and early 30's, the area became honky tonk. Many of the theatres in the project area were converted to movie houses. Deterioration began and almost no construction occurred in the project area since the early 1920's, the legitimate theatre activity having moved to the north.

By the time the 42nd Street project area was proposed in the early 1980's, as contrasted with the surrounding area with new hotel, office and residential construction, the project area contained either vacant lots or underutilized parcels supported by deteriorated and obsolete buildings. The economic and social character of the project area was determined principally by street level retail uses which contributed to and supported the street conditions prevailing at that time. Such uses included 14 movie houses whose fare consisted of either pornography, horror or martial arts. These operated over long hours with high patron turnover and

contained a considerable amount of illicit activity. In fact 42nd Street contained the largest concentration of sex related businesses in the city and many were located near the area movie houses. Contributing also to the character of the area was the fact that 16 establishments, excluding restaurants, sold either beer or liquor. The project area's 20 plus fast food shops, amusement and arcades while posing no direct problem, did reinforce the area's problems by providing support and loitering areas for those engaged in questionable street activity.

The three area "hotels", the Strand, National and Carter similarly provided support in part for such illegal activity as prostitution and drug dealing. Indeed, the subject Strand Hotel was closed for that latter reason.

Details with respect to the high degree of illegal street or other related sordid activities which gave to the area its unsavory reputation are set forth in greater detail statistics in Haim's appraisal and in the final Environmental Impact Statement (§2, 82-87) submitted in connection with this project. Indeed the blighted condition of the area was recognized by the Court of Appeals in Jackson v. UDC, 67 New York 2d 400, 412 (one of the many decisions involving unsuccessful challenges to the project).

In sum, the area pre-project had been the subject of pervasive deterioration both physically and socially over many years, with a long standing unsavory reputation which resisted change or rehabilitation. Any examination as to the project area's potential for redevelopment absent the project

thus must be had against this historical backdrop of area crime, loitering, deterioration and general unsavory reputation.

Addressing specifically Albert's development claim for the subject property, he does not seriously urge or persuade that any developer would build just on claimant's 18' x 120' lot. Such a structure would not have been economically viable. Rather he contends that it would have been acquired to be part of an assemblage site for a large mega building to be developed over the eastern portion of claimant's block bounded on the west by the Lyric and Victory theatres and on the east by 7th Avenue, an area of some 29,000 S/F. However, while this valuation is grounded upon the premise that an appropriate site would be assembled no specifics are provided identifying by whom, how large and when. Further, even if such hypothetical developer were considering assembling an appropriate size site in this area he would be immediately aware that it would be surrounded still by the unsavory street activity that permeated the project area and gave it its reputation. Such developer would not have the advantage of condemnation to globally eliminate these problems.

In addition to the deterrent effect street conditions have had and would have in discouraging commercial investment in redevelopment there is the further potential difficulty in assemblage due, not only to the fact that the parcels in this area are in different ownerships, but also because of cost of acquisition. Purchase of and assemblage would not come cheap or easy. These properties contain high volume and highly profitable cash businesses which could and would resist

development (as they did this condemnation). Parenthetically, the other project claimants' properties, which made up Albert's proposed development site have submitted damage values similarly predicated on development in the area aggregating some $65,000,000, values even in excess of their own vacant land values. Unlike compensation paid in condemnation, which is fixed at market, a private assemblage must pay what is asked.

While fair market value may take into account a parcel's probable assemblage with other properties such "speculative use must be substantiated by proof of facts that indicate a likelihood that the property would be put to such use within a reasonable close future" (Matter of the City of New York (Dexter Motors Inc.), *supra* 21 A.D.2d, 652, 653, aff'd, 16 New York 2d, 814).

In the instant case there is "no probative evidence to support the conclusion that the other properties were available to form an assemblage with the subject parcel" (S. Robert Scheur, as Trustee v. State of New York, 65 A.D.2d, 921, Matter of City of Rochester v. Iman, 51 A.D.2d, 651). Nor was there any indication that without condemnation such assemblage would have been undertaken privately and a market for claimants' parcel (or air rights) created thereby "within a reasonably close future". In sum, "if the parcels were not brought together by a taking under eminent domain the chance of their being united by agreement or purchase in such a way as to be available well may be regarded as too remote and speculative to have any legitimate effect upon the valuation" (McGovern v. City of New York, 229 U.S. 363, 372).

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Also significant on the probability of development at the times suggested by claimant is the fact that the very climate for development in the 1980's upon which claimant bases a market for its property, resulted in a glut of new commercial space. So much so that the instant project was amended to put on hold the original commercial towers planned for the area.

Even more unpersuasive is claimants hypothesized retention of the existing hotel with sale of excess air rights to an adjacent site. Transfer development rights (TDR) have limited potential recipients. In this case they would be adjacent sites to the east and west of claimant's parcel.

Besides claimant's disreputable hotel, the eastern portion of claimant's block contained fast food establishments, bars and other sources of beer and liquor, a pin ball arcade and an active movie all operating on extended hours. Immediately to the west of this area were theatres and other businesses which similarly attracted unpalatable street activity, conditions, which at least prior to this project, showed no sign of change in the foreseeable future. It is not reasonable to assume that a developer would expend sums to acquire and put up a first class building to still be surrounded by continuing deterioration and crime. Nor, as indicated, are there sufficient facts to indicate when, if ever, a demand for said TDRs would be created. What is also interesting is that almost all other claimants' parcels in this portion of the project area, in order to maximize value claims, opine retention of the existing structures with sale of unused air rights. It is not entirely clear who is to receive all these air rights since none have opted to be a receptor site.

In sum, claimant does not persuade that there was a reasonable probability that its property or air rights would have been marketable for assemblage purposes. There certainly was no hint of it prior to 1980. Indeed, the only apparent assemblage for development in the project area was that on a 42nd Street/8th Avenue in the 1960's, and that failed leaving a site that became a parking lot and remained so at vesting.

It is therefore clear that the instant condemnation or "threat" thereof did not effect the value of the claimant's property. To opine that this 18' by 120' lot or its air rights would have been marketable at an enhanced price based upon a need by some yet unknown site assembler for claimant's land or TDRs would be pure speculation and is unsupported by the facts in this case (Scheuer v. State of New York, 65 A.D.2d 921).

"Care must be taken, however, not to substitute for reality the mere hope of the owner that the property may be used for some specific purpose. Therefore, in order to merit consideration the potential user must be so reasonably probable as to motivate a prospective purchaser in his desire to acquire the property" (Nicholas, Law of Eminent Domain, Section 12B.14[2], citing U.S. v. Toronto, Hamilton et al (338 v. U.S. 396, McGovern v. New York, 229 U.S. 363). Such has not been demonstrated herein.

The court thus concludes that highest and best use for this property is as it existed and the compensation to be awarded will be determined upon that basis. Though both

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Haims and Albert obtained value for the hotel through analysis of "comparable hotel sales", to obtain an adjusted S/F building value for the subject property, the Court finds, because of the limited number of comparables used, and significant difference in the hotel service and ambience provided by these comparables in contrast with what the Strand offered, and the exaggerated adjustments required to obtain "comparability", that the sales comparison approach to value, is not persuasive in this case.

While there may be some slight entrepreneurial aspect involved in income generation, the Court concludes that both appraisers alternative income capitalization analyses can more appropriately be employed herein to obtain value. The Court adopts claimant's $40 daily room rate (a melded rate which takes into account a potentially higher rate for rooms with bath and a lower one for those without). The Court further finds that by reason of the age and condition of the building, the minimal services provided and the fact that a substantial number of rooms are without bath, that a 50% vacancy rate is appropriate. The result is a gross stabilized annual room rental income of $781,000 ($40 x 365 [days] x 107 [rooms] x .50 [vacancy rate]).

For the 10,000 s/f of available store space the Court finds from an analysis of comparables submitted a s/f value of $60 to yield a store income of $60,000. A further income of $15,000 is found for potential signage. The foregoing results in a total gross building income of $856,000. From this the Court will deduct a 5% vacancy factor from the store and signage income ($3,750) leaving a gross effective income of

$852,250. Against this the Court will deduct stabilized expenses in the manner suggested by Albert, as follows:

Real Estate Taxes (actual)	$ 35,925
Room expense (30% of hotel income)	234,000
Energy (2.50/room/day x 365x107x.50)	48,818
Administrative (hotel) 10% of hotel income	78,100
Insurance ($2.00 room/day x 365x107x.50)	39,055
Reserves (3.5% hotel/income)	27,335
Room rehab., $3,000/room-15yr. amortization	64,031
Property operations/maintenance ($3.00 room/day x 365x.50)	58,582
Management (5% of gross building income)	42,612
Total	$628,458

The result is a net operating income of $223,802 ($852,250 - $628,458). Adopting a capitalization rate of 11% results in a damage value for this property of $2,034,565. Settle order and decree.

Dated: 8/18/97 J.S.C.

Supreme Court, U.S.
FILED
JAN 27 2003
CLERK

No. 02-909 (3)

In The Supreme Court of the United States

THREE O REALTY, LLC,

Petitioner,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION D/B/A EMPIRE STATE DEVELOPMENT CORPORATION, and 42nd STREET DEVELOPMENT PROJECT, INC.,

Respondents.

On Petition For Writ Of Certiorari To The New York Court Of Appeals

REPLY BRIEF FOR PETITIONER

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
Telephone: (215) 493-1973
Facsimile: (215) 493-1094
hamilton02@aol.com
Counsel of Record

MARK I. SILBERBLATT, ESQ.
NOVACK BURNBAUM CRYSTAL, LLP
300 East 42nd Street
New York, NY 10017
Telephone: (212) 682-4002
Facsimile: (212) 986-2007
msilberblatt@nbclaw.com

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY

I.

Respondents rightly concede that where the factfindings supporting a taking are pretextual the taking is unconstitutional. Resp. at 24. ("No case has ever held that a pretextual blight finding is sufficient" for takings purposes.). Respondents fail, however, to rebut the fact that there is a split in the lower courts regarding whether the courts will ask whether blight findings are pretextual. *See* Pet. at 21-24. Some courts accept at face value the sort of vague and general claims to blight made in this case, and others look beneath the blight findings to ensure that they rest on fact and not fiction. That is a split worthy of this Court's attention.

The Respondents' attempt to paint this case as consistent with prior Supreme Court precedent also fails. When the Supreme Court has addressed the Takings Clause's public use requirement, it simply has not been faced with the question whether the factfindings were pretextual or actual. *See National RR Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). In these cases, substantial evidence was assembled in advance of the taking to support the public use conclusion. The Court never has intimated that local and state governments have latitude to make up the facts underlying a blight finding. Nor has it upheld a finding of public use in a case such as this one where the development authority made its relevant blight determinations only *after* it publicly declared its purpose to take the property. This case squarely presents the issue whether the courts, in deferring to the findings of takings authorities, may examine whether the blight findings are

pretextual. The Supreme Court has not addressed this issue and should do so in this case.

II.

Respondents repeatedly intone that the record is adequate to support an actual finding of blight at Site 8 South, claiming that there has been an unbroken record of blight on the sight. Resp. at 2, 7, 10-11, 17. Yet, Respondents fail to note for this Court that in 1994 they stated that it might be unnecessary to take Site 8 South for purposes of the 42nd Street Development Project. Rec. at 160 (1994 Determination and Findings) (considering eliminating Site 8 South from the 42nd Street Development Project).[1] In other words, the so-called blighted nature of Site 8 South was insufficient to require condemnation as of 1994 – at a time when the Times Square area was significantly less developed than it now is. Once the New York Times entered the picture, however, the ESDC resumed its pre-1994 refrain of blight, as though it had never considered Site 8 South sufficiently improved to remove it from the Project. Moreover, only *after* the New York Times deal was made did the ESDC craft the Environmental Review Technical Assessment ("ERTA") on which it now relies to prove ongoing blight. Resp. at 10-15.

The ESDC should not be permitted to rely on post-hoc blight findings to justify a taking. To hold otherwise is to

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[1] Record citations are taken from the printed record in the Supreme Court of the State of New York, Appellate Division, First Department.

take us through the Constitution's looking glass and to permit governments to take first, and justify later.

The ERTA proves its pretextual nature through its overstatement when it declares that "*all* of the Site 8 S stores are inconsistent with the overall Project's scale. . . . *None* of the existing uses support the Project goals. . . . such as restoring the Project area's role as a positive influence on the adjacent communities, and increasing the Project area's economic contribution to the City as a whole." Resp. at 11 (emphasis added). Respondents conveniently ignore the fact that Petitioner Three O Realty's 16-story building was at maximum capacity, with a waiting list of tenants and high-quality tenants in place like fashion designer Donna Karan, when the ESDC declared its intent to condemn the property for the benefit of the New York Times. They also ignore the significant investment sunk into Three O's building, the development of which clearly served the economic interests of Site 8 South and contributed positively to the street life on 40th Street, which contrary to Respondents' description, is consistently busy with the sort of pedestrian traffic sought by the 42nd Street Development Project.

III.

The Respondents also imply that Petitioner somehow failed to rebut their findings in the record. In effect, they misrepresent the New York procedure. The New York takings procedure makes it impossible for taking subjects to challenge the facts claimed by the ESDC. *See* Pet. 4-5 (Sec. 207). There was simply no opportunity to rebut the unilateral, unproven, and untrue factual claims of the ESDC. Were this Court to grant certiorari, Petitioner

would request that it reverse the decision below and order New York to institute some means by which those subject to a taking may present evidence to challenge blight findings for the purpose of ensuring the record supporting a taking is accurate, rather than a pretext.

Respectfully submitted,

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 493-1973
(215) 493-1094 (fax)
hamilton02@aol.com
Counsel of Record

MARK I. SILBERBLATT, ESQ.
NOVACK BURNBAUM CRYSTAL, LLP
300 East 42nd Street
New York, NY 10017
(212) 682-4002
(212) 986-2007 (fax)
msilberblatt@nbclaw.com

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